Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232

COMMENTS OF
INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

Intercollegiate Broadcasting System, Inc., a Rhode Island non-profit corporation which has represented the interests of educationally affiliated radio stations since 1940 ("IBS"), files these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding ("NPRM").

In the NPRM, the Commission seeks comment on its proposal to require broadcasters to retain recordings of their broadcast for a limited period of time. NPRM ¶¶ 1, 6. Specifically, the Commission proposes "requiring broadcasters to retain a recording of all material they air during the hours of 6 a.m. and 10 p.m., when children are likely to be in the audience, for a limited period of time." NPRM ¶ 7. Among other things, the Commission seeks comment on the proper length of time a copy of programming should be retained by a licensee, the steps a broadcast station must take to comply with the proposed requirements, the financial burden the proposals may impose and the impact that retention rules may have on small broadcasters, NPRM ¶¶ 7, 9.

I. The Commission's Initial Regulatory Flexibility Analysis Does not Adequately Differentiate the Impact on Small, Educationally Affiliated Broadcasters.

The requirements of the Regulatory Flexibility Act, P.L. 95-354 (1981), as amended by the Debt Limitation Act, P.L. 104-121 (1996), Title II of which is known as the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C., ch. 6, are not satisfied as to this rulemaking proceeding by the Docket No. 04-232 notice. Section 603 (Initial regulatory flexibility analysis) of the Regulatory Flexibility Act, as amended, 5 U.S.C. § 603, requires that whenever an agency issues a notice of proposed rulemaking such as that published by the Commission on July 7th, "the agency shall prepare and make available for public comment an initial regulatory flexibility analysis."[1] Section 601 (Definitions) of the 1980 Act, 5 U.S.C. § 601, applies the requirements of the Act to all government "authorities" falling within the scope of Section 2(a) ("agency") of the Administrative Procedure Act of 1947, now 5 U.S.C. § 551(1). The Commission's Initial Regulatory Flexibility Analysis ("IRFA") does not meet the requirements of the Regulatory Flexibility Act because it does not differentiate educationally affiliated broadcasters from other small broadcasters. As discussed below educationally affiliated broadcasters are different from other small broadcasters, in that educationally affiliated stations are subject to institutional supervision and do not respond uncritically to commercial motives. Such institutional supervision is often implemented by faculty members who advise and in some cases supervise or direct the operations of educationally affiliated broadcasting stations.

[1] Such IFRA "shall describe the impact of the proposed rule on small entities" and shall be published in the Federal Register and transmitted to the Chief Counsel for Advocacy of the Small Business Administration.

II. The Proposal as to Small Educationally Affiliated Broadcasters Would Violate the Public Policy of the United States by Unnecessarily Burdening Stations and Academic Budgets.

Certain substantive limitations on the outcome of the NPRM are imposed by the Regulatory Flexibility Act, P.L. 95-354, as amended, enacted into positive law as 5 U.S.C., ch. 6. The public policy of the United States government, as declared in Congress in Section 2 (Congressional Findings and Declaration of Purpose) of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt, is to require that both governmental regulations and "informational requirements" differentiate in a meaningful way between large entities and small entities, so as "to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation."[2] Section 2(b) then "establish[es] as a principle of regulatory issuance that agencies shall endeavor ... to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions" subject thereto. The Commission, as an administrative agency, is bound by the public policy of the United States.

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[2] In Section 2(a) Congress "finds and declares that --

"(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

"(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

"(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

"(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

The proposed rules do not adequately take into consideration the "the scale of the business, organizations, and governmental jurisdictions" subject thereto. Neither do the proposed rules meet the Commission's goal of "establish[ing] a retention period that is long enough to ensure that the recording will be available in response to a LOI, but not so long that it imposes unreasonable burdens[3] on such licensees." NPRM ¶ 7. The proposed changes to the Commission's rules impose unreasonable burdens on broadcasters affiliated with educational institutions. IBS estimates that compliance with the recording retention requirement (even for thirty days, which is less than the proposed 60 or 90 days) would cost its member radio stations and webcasters approximately $ 500, not including the costs incurred for the technical assistance that would be required to maintain the retention system. While such costs may not be burdensome for most commercial broadcasters, that amount would be burdensome for many

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"(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

"(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

"(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

"(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules."

[3] In cases in which a licensee can neither confirm nor deny the allegations of indecent broadcasts in a complaint, the FCC has held that the broadcasts occurred. *See, e.g., Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 1768 (2004). "Under such circumstances, broadcasters may find it in their interest to retain recordings for a longer period than the proposals above [60 or 90 days] suggest. ... [A] broadcast station may currently retain recordings on a voluntary basis in the absence of a mandate from the Commission." NPRM ¶ 7, nt. 9.

of the 904 IBS Member Radio Stations and Webcasters, half of whose entire yearly budgets are less than $9,000.[4]

For example, the Commission is proposing that stations record all of their programming from the hours 6 a.m. – 10 p.m. and keep it accessible for a fixed period of time (*e.g.* 30-60 days, *etc.*). However, substantially all IBS Members do not currently record (audio log) their signals, nor have the equipment or personnel to do the job. Only 101 IBS Members have one or more full-time paid staff people with the vast majority are staffed by volunteers, principally students at the educational institution. These are America's Sons and Daughters who are being benefited by the programming and operating experience obtained in staffing these stations. Many stations are part of the curricular program of the sponsoring institutions and the basis for academic credits applicable to course requirements for major degrees. The educationally affiliated stations are also the trainers of future managers and performers for the broadcasting and allied industries.

A major burden for non-commercial broadcasters would be the cost of purchasing, installing, and operating such a system and the technical knowledge required for maintenance and action in the case of infringement. Hardware for audio skimming (e.g., *recording* only when the announcer or disc jockey is speaking) is available and commonly used in many commercial (and some of the more sophisticated non-commercial) stations.[5] However, recording all of a

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[4] An analysis of 904 IBS Member Radio Stations and Webcasters, 671 of which hold FCC, AM, and, or, FM licenses based on 2003 data indicates that annual budgets for such stations range from $500 to $300,000 with the average being $9,000 per annum.

[5] The acceptability of such devices would be dependent on the text of any rule that might finally be adopted by the Commission.

station's air would require a solution with a more robust storage medium (such as a hard drive) instead of changing tapes, recordable CDs, *etc.* every hour.

At a bare minimum[6] broadcasters would be required to purchase the following hardware (and approximate costs) would be required to record and store thirty days of audio (at a low quality suitable for monitoring but probably not listening to music): (1) dedicated low-end computer with cheap audio card - approximately $ 300; (2) recording software - approximately free to $100 (depending on sophistication); and (3) hard-drive - a standard 20 GB is more than enough to record the 480 hours at 16k/sec. quality - approximately $ 75. In addition broadcasters would also have to suffer costs for setup, training, and maintenance. Setting up an archival system would require several hours of technical assistance (writing a nightly script to delete old material, turn on/off at the 6 a.m./10 p.m., *etc.*). Reliable operation of the system would require that the station have someone with technical proficiency to maintain it on a regular basis. In addition, if a timely complaint were to be received, the station would need someone on staff to isolate the allegedly infringing material (this function would require technical knowledge, as well).

If the final version of the rule were to impose absolute liability on the licensee for the making and preserving of the recordings, then duplicative or triplicative equipment and labor would be necessitated, thereby proportionally increasing the cost-burdens of equipment and labor imposed by the rule from those described above.

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[6] A second option would include purchasing a dedicated piece of professional broadcast equipment which is of a plug-in and ignore variety. The costs for such equipment could be as high as $2,000, a disproportionately large percentage of most IBS members' total annual operating budgets.

There is no need to impose such requirements on educationally affiliated stations. There is nothing to indicate that such stations have been a prolific source of obscenity complaints. In addition educationally affiliated stations are already subject to institutional supervision which the Commission's proposal would unnecessarily and burdensomely duplicate. The need as to such stations is further attenuated by the Commission's own appraisal that "[m]any complainants are able to provide enough detail for us to determine that enforcement action is warranted, even if the licensee has no transcript or recording of the program to provide in response to an LOI." NPRM ¶ 6. In fact, for the period between 2000 and 2002, a period in which the Commission received 14,379 complaints covering 598 programs the Commission denied or dismissed only 169 (less than 1.2%) of those complaints for the lack of a tape, transcript, or significant excerpts. *NPRM* ¶ 6, nt. 8, citing Letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004.

Given the burden imposed by the rules and the low incidence of complaints which are dismissed for lack of a recording, the FCC should, where a class of broadcasters is affiliated with an educational institution, rely on the institutions.

CONCLUSION

For the reasons indicated above, the Commission should revise its RFA and should accordingly revise its proposed rules to reflect the special impact of the proposal on educationally affiliated broadcasters or should either dismiss the NPRM or exempt the educationally affiliated broadcasters.

Respectfully submitted,

William Malone
James R. Hobson
Marci L. Frischkorn
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W., #1000
Washington, D.C. 20036-4306
202-785-0600

Counsel for Intercollegiate Broadcasting System, Inc.

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